



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	04/14/05	Bill No:	SB 400
Tax:	Cigarette and Tobacco Products Licensing Act	Author:	Kuehl
Related Bills:			

BILL SUMMARY

This bill would make changes to the penalties imposed on a retailer convicted of furnishing cigarettes or tobacco products to a person under 18 years of age.

Summary of Amendments

The amendments to this bill since the previous analysis clarify when a violation is grounds for a suspension or revocation of a license to sell cigarettes and tobacco products for violations of the underage sales provisions of the STAKE Act by a retail licensee. The amendments also narrow the authority to impose sanctions upon retail license holders for underage sales law, and make other clarifying changes.

ANALYSIS

Current Law

Cigarette and Tobacco Products Licensing Act of 2003

Division 8.6 (commencing with Section 22970) of the Business and Professions Code, known as the Cigarette and Tobacco Products Licensing Act of 2003 (Act), requires retailers selling cigarette and tobacco products in this state to have a license to engage in the sale of such products.

Section 22974.8 of the Business and Professions Code requires the Board of Equalization (Board) to take action against a retailer convicted of a violation of either the STAKE Act or Section 308 of the Penal Code, according to the following schedule:

- Upon the first conviction of a violation, the retailer receives a warning letter from the Board that delineates the circumstances under which a retailer's license may be suspended or revoked and the amount of time the license may be suspended or revoked. The retailer and its employees are required to receive training on tobacco control laws from the Department of Health Services upon a first conviction.
- Upon the second conviction of a violation within 12 months, the retailer is subject to a fine of five hundred dollars (\$500).
- Upon the third conviction of a violation within 12 months, the retailer is subject to a fine of one thousand dollars (\$1,000).
- Upon the fourth to the seventh conviction of a violation within 12 months, the Board is required to suspend the retailer's license to sell cigarette and tobacco products for 90 days.

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- Upon the eighth conviction of a violation within 24 months, the Board is required to revoke the retailer's license to sell cigarette and tobacco products.

Convictions of violations by a retailer at one retail location are not accumulated against other locations of that same retailer. Furthermore, convictions of violations accumulated against a prior retail owner at a licensed location are not accumulated against a new retail owner at the same retail location.

This provision becomes operative on the date results from the Youth Tobacco Survey are released if the survey finds that 13 percent or more of youth were able to purchase cigarettes. The Board's authority to take action under this provision becomes inoperative on or after the date of the subsequent release of the results from the survey showing that less than 13 percent of youth were able to purchase cigarettes.

Stop Tobacco Access to Kids Enforcement (STAKE) Act

The STAKE Act (Division 8.5 (commencing with Section 22950)) of the Business and Professions Code established a statewide enforcement program to take action against businesses that illegally sell tobacco to minors. In general, the Act requires the Department of Health Services (DHS) to:

- Implement an enforcement program to reduce the illegal sale of tobacco products to minors and to conduct sting operations using 15 and 16 year old minors granted immunity;
- Operate a toll-free number for the public to report illegal tobacco sales to minors;
- Assure that tobacco retailers post warning signs which include the toll-free number to report violations;
- Assure clerks check the identification of youthful-appearing persons prior to a sale;
- Assess civil penalties ranging from \$200 to \$6,000 against the store owner for violations; and
- Comply with the Synar Amendment (Section 1926 of Title XIX of the federal Public Health Service Act) and prepare an annual report regarding enforcement activities and their effectiveness for the federal government, Legislature, and Governor.

Furthermore, the STAKE Act:

- Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers if the purchaser reasonably appears to be under 18 years of age.
- Prohibits any person, firm, or corporation from selling, giving, or in any way furnishing to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance.
- Prohibits the selling, offering for sale, or distributing tobacco products from a cigarette or tobacco products vending machine unless such vending machines or

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appliances are located at least 15 feet away from the entrance of a premise issued an on-sale public premise license, as defined.

- Prohibits advertising of any tobacco product on any outdoor billboard, as specified.
- Prohibits the distributing or selling of tobacco products directly or indirectly to any person under the age of 18 years through the United State Postal Service or through any other public or private postal or package delivery service, as described.

Penal Code Section 308

Penal Code Section 308 prohibits every person, firm, or corporation which knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, from selling, giving, or in any way furnishing to another person who is under the age of 18 years:

- Any tobacco, cigarette, or cigarette papers, or
- Any other preparation of tobacco, or
- Any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or
- Any controlled substance.

Any person failing to comply is subject to criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense.

Section 308 also requires every person, firm, or corporation which sells, or deals in tobacco or any preparation thereof, to post conspicuously and keep posted at each point of purchase a notice that states, in part, selling tobacco products to anyone under 18 years of age is illegal. Any person failing to do so is punished, upon conviction, by a fine of ten dollars (\$10) for the first offense and fifty dollars (\$50) for each succeeding violation, or by imprisonment for not more than 30 days.

Proposed Law

This bill would repeal and add Section 22974.8 to the Business and Professions Code to make various changes to the penalties imposed for a conviction of a violation by a licensee of the STAKE Act or 308(a) of the Penal Code. Specifically, any conviction or final administrative adjudication for a violation by a retail licensee of underage sales laws pursuant to the STAKE Act or Penal Code Section 308 would be grounds for the suspension or revocation of a license to sell cigarette and tobacco products.

A conviction or final administrative adjudication for a violation that was committed by an agent or employee of a retail licensee would be conclusively presumed by the Board. Such action could be appealed to the Board, as specified.

If the Board finds that there are grounds for suspending a retail license, the Board would be required to impose the following sanctions for a violation within a five-year period by a retail licensee or an agent or employee of a retail licensee:

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- Upon a finding by the Board of a first violation, the license would be suspended for 30 days.
- Upon a finding by the Board of a second conviction, the license would be suspended for 90 days.
- Upon a finding by the Board of a third conviction, the license would be suspended for 120 days.
- Upon a finding by the Board of a fourth conviction, the license would be suspended for 365 days.
- Upon a finding by the Board of a fifth conviction, the license would be revoked permanently and the former licensee shall not apply for, or be granted, a license at any time in the future.

Any licensee whose license is suspended or revoked may petition for a redetermination of the suspension or revocation within 30 days after service upon the licensee of the notice of the suspension or revocation.

This bill would add Section 22980.05 to require a state or local law enforcement agency to notify the Board of any convictions under Section 308 of the Penal Code or final administrative adjudication for violations of the underage sales provisions of the STAKE Act that involve a retail licensee or licensed premises, within 30 days of a final judgment. The notice must include all of the following:

- A certified copy of the final judgment for a criminal or civil case.
- The retailer's license information for the location at which the violation occurred.
- If the judgment is only against an employee, the result of an administrative hearing concluding that the sales clerk was an agent of the retailer at the time of the violation.
- Failure by a state or local law enforcement agency to notify the Board within 30 days of a final judgment would not affect the validity of the violation

A state or local law enforcement agency would not be subject to any penalties contained in this subdivision for failure to notify the Board within 30 days of a final judgment, as required.

The provisions of this bill would become effective January 1, 2006.

In General

In 1992, Congress passed Section 1926 of Title XIX of the federal Public Health Service Act, commonly called the "Synar Amendment." The Synar Amendment requires each state to:

Have in effect a law prohibiting any manufacturer, retailer or distributor of tobacco products from selling or distributing such products to any individual under the age of 18.

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Enforce such laws in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18.

Conduct annual random, unannounced inspections to ensure compliance with the law. These inspections are to be conducted in such a way as to provide a valid sample of outlets accessible to youth.

Develop a strategy and timeframe for achieving an inspection failure rate of less than 20% of outlets accessible to youth.

Failure to meet the terms and conditions of the Synar Amendment could result in reductions (up to 40 percent) in the amount of Substance Abuse Prevention and Treatment (SAPT) block grant funds allocated to California for alcohol and other drug prevention and treatment programs.

To comply with the Synar Amendment, the Legislature passed Senate Bill 1927 (Stats. 1994, Ch. 1009) which established the Stop Tobacco Access to Kids Enforcement (STAKE) Act. The STAKE Act created a new statewide enforcement program to take regulating action against businesses that illegally sell tobacco products to minors. Authority for enforcement and responsibility for implementation of the program was delegated to the DHS, Food and Drug Branch.

Background

In 2003, AB 71 (J. Horton) added Division 8.6 (commencing with Section 22970) of the Business and Professions Code known as the Cigarette and Tobacco Products Licensing Act of 2003.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the American Lung Association and the American Heart Association and is intended to strengthen the Act's provisions related to illegal sales of tobacco to minors.

According to the sponsor, "Every day, 200 to 300 children in California start smoking, and one-third of these kids will die from tobacco-related illness. Despite the best efforts of local and state legislation and law enforcement, California faces an ongoing problem with illegal tobacco sales to minors.

"The state's tobacco license program, adopted in 2003, is designed primarily to reduce cigarette smuggling and losses of tobacco and sales tax revenues, and unfortunately, includes flawed provisions related to illegal sales of tobacco to minors. The ineffective license suspension and revocation provisions create a situation whereby a retailer will be at little to no risk of losing their license for selling cigarettes to children."

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2. **The April 14, 2005 amendments** clarify when a violation is grounds for a suspension or revocation of a license to sell cigarettes and tobacco products for violations of the underage sales provisions of the STAKE Act by a retail licensee. The amendments also narrow the authority to impose sanctions only upon retail license holders for underage sales law, and make other clarifying changes.
3. **What is final administrative adjudication under the STAKE Act?** According to DHS staff, final administrative adjudication occurs when a violation is appealed and processed through an administrative hearing with an administrative law judge making a ruling on that violation. However, not all violations of the STAKE Act are appealed and heard before an administrative law judge. Such violations include those where the fines imposed pursuant to the STAKE Act are simply paid upon receipt of a demand letter and the violation is not contested. Board staff is concerned that uncontested violations where the retail licensee pays the fine would not be considered "final administrative adjudication" for purposes of the Board imposing the sanctions provided in this measure.

It should also be noted that Penal Code Section 308 violations that are not prosecuted would not be considered a conviction for purposes of this measure.

4. **The grounds for a suspension or revocation are contradictory.** This measure specifically provides in proposed Section 22974.8(a) that any conviction or final administrative adjudication for a violation of the STAKE Act or Section 308 of the Penal Code is grounds for suspension or revocation of a license to sell cigarettes and tobacco products. However, subdivision (c) of that same section provides that the Board shall impose specified sanctions for a violation if the Board finds that there are grounds for suspending a license.

Accordingly, subdivisions (a) and (c) conflict since the bill states that a violation is grounds for a suspension or revocation **and** also states that the Board is required to make a finding whether there are grounds for a suspension. Why would the Board make a finding as to whether there are grounds for a suspension if the bill states that a violation provides such grounds?

According to the bill's sponsor, the intent of the bill is for the Board to impose the specified sanctions upon notification from the proper agencies that there has been a conviction or final administrative adjudication of a violation. Board staff also believes that a Board action for a violation should be specified in statute and not left to the discretion of Board staff. Therefore, the following language is suggested:

22974.8. (a) In addition to any other civil or criminal penalty provided by law, any conviction for a violation by a licensee of or final administrative adjudication for a violation by a retail licensee of underage sales laws pursuant to the STAKE Act (Division 8.5 (commencing with Section 22950) or Section 308 of the Penal Code shall be subject to the sanctions provided in subdivision (c) ~~is grounds for suspension or revocation of a license to sell cigarette and tobacco products.~~

(c) ~~If the board finds that there are grounds for suspending a retail license, the~~ The board shall impose the following sanctions for a violation of any provision described in subdivision (a) within a five-year period by a retail licensee or an agent or employee of a retail licensee:

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5. **Petition for redetermination process not consistent with Act.** This bill would allow a licensee, whose license is suspended or revoked, to petition the Board for a redetermination of that suspension or revocation, as specified. The petition for redetermination process is an in-depth process that is generally provided to a taxpayer contesting a liability for taxes or fees. This process allows for discussion with Board staff, and if not resolved at the staff level, may proceed through a *succession of steps* to a hearing before the elected Members of the Board.

This appeals process appears unnecessary since this bill specifically provides the sanctions to be imposed by the Board for a conviction of a violation of the STAKE Act or Section 308 of the Penal Code. Since the bill is unambiguous as to the sanctions to be imposed, it appears there are only a few causes for which a revocation or suspension may be dismissed. For example, a dismissal may result where the Board suspends or revokes the license of someone other than the licensee convicted of a violation under the STAKE Act or Section 308 of the Penal Code, or where the Board imposes a sanction for the incorrect number of convictions.

As such, it is suggested that license suspension and revocation follow the provisions applicable to the revocation of a license as set forth in Section 30148 of the Revenue and Taxation Code. This would be consistent with all other suspensions and revocations under the Act. The appeal process pursuant to Section 30148 is an abbreviated process when the penalty for a violation(s) is a license suspension or revocation. Appeals of this nature go directly before the elected Members of the Board for a hearing, which allows for an expeditious resolution.

The following language is suggested to replace the current provisions contained in subdivision (d) of Section 22974.8:

22974.8. (d) The board shall revoke or suspend the license, pursuant to the provisions applicable to the revocation of a license as set forth in Section 30148 of the Revenue and Taxation Code.

6. **Violations by an agent or employee of a retail licensee.** This bill provides in Section 22974.8(b) that a conviction or final administrative adjudication for a violation that was committed by an agent or employee of a retail licensee shall be conclusively presumed by the Board. However, it is not clear what is intended by this provision. For example, is the intent to require the Board to impose the specified sanctions against a retail licensee for violations enforced against an agent or employee of that retail licensee?

In addition, subdivision (b) would also allow a Board action to impose specified actions for a violation committed by an agent or employee of a retail licensee to be appealed to the Board. If the statute requires the Board to impose these actions for such a violation, how could the Board overturn this requirement through an appeal? If the Board were provided with the discretion to count an agent or employee violation against a retail licensee, what would be the basis for such a decision? Making such a decision appears to be outside of the Board's area of expertise.

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7. **This bill eliminates the “trigger” for the Board to impose penalties for STAKE Act and Penal Code Section 308 violations.** Existing law provides that the Board’s authority to take action against retailers pursuant to Section 22974.8 commences on the date results from the Youth Tobacco Survey are released if the survey finds that 13 percent or more of youth were able to purchase cigarettes. The Board’s authority to take action under this provision will become inoperative on or after the date of the subsequent release of the results from the survey showing that less than 13 percent of youth were able to purchase cigarettes.

In 2004, the results of the Youth Tobacco Survey found that 13 percent or more of youth were able to purchase cigarettes. As such, the Board currently has the authority to take action against retailers that are convicted of a violation of either the STAKE Act or Section 308 of the Penal Code. It is anticipated that the results of the 2005 Youth Tobacco Survey will be released in the fall of 2005.

8. **Suggested technical amendment.** The following amendment to correct the subdivision references is suggested:

22980.05. (b) Notice by a state or local law enforcement agency to the board shall include all of the following:

(1) A certified copy of the final judgment for a criminal or civil case.

(2) The retailer’s license information for the location at which the violation occurred.

(3) If the judgment is only against an agent or employee, the result of an administrative hearing concluding that the sales clerk was an agent of the retailer at the time of the violation.

(4c) Failure by a state or local law enforcement agency to notify the board within 30 days of a final judgment pursuant to subdivision (a) shall not affect the validity of the violation for purposes of Section 22974.8.

(ed) A state or local law enforcement agency shall not be subject to any penalties contained in this subdivision for failure to notify the board within 30 days of a final judgment as required by subdivision (a).

COST ESTIMATE

The Board would incur some costs for suspending or revoking retail licenses, processing appeals filed for a suspended or revoked license through the petition for redetermination process, inspecting suspended or revoked retail licensee locations, and seizing cigarettes or tobacco products for continued sales of such products after a license has been suspended or revoked. Additional costs would also be incurred for the storage and destruction of seized property. A detailed cost estimate is pending however, these costs are anticipated to be moderate (over \$50,000 and under \$250,000) based on the assumption that approximately 1,000 convictions and final administrative adjudications under Section 308 of the Penal Code and the STAKE Act, respectively, would be annually forwarded to the Board for action.

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REVENUE ESTIMATE

This provision would not affect the state's revenues.

Analysis prepared by:	Cindy Wilson	445-6036	04/29/05
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Contact:	Margaret S. Shedd	322-2376
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